Elson Advocacy

April 29, 2022

BY RESS

Nancy Marconi
Registrar
Ontario Energy Board
2300 Yonge Street, Suite 2700, P.O. Box 2319
Toronto, Ontario M4P 1E4

Dear Ms. Marconi:

Re: EB-2022-0011 – Framework for Review of Intervenor Processes and Cost Awards

I am writing on behalf of Environmental Defence to provide comments regarding the Framework for Review of Intervenor Processes and Cost Awards.

We have had the benefit of reviewing draft comments from other intervenors. We agree that the intervenor system is an excellent way to provide a diversity of views and to produce the best outcomes for ratepayers. A multi-party system ensures a variety of viewpoints and a variety of representatives with different areas of expertise. Overall, the system works very well. We believe some improvements could be made, as outlined below. However, attempts to significantly change existing processes to pre-emptively constrain intervenor participation are not in the interests of ratepayers and would result in cost savings that are trivial in comparison to the potential negative outcomes for ratepayers.

In particular, we request that the OEB maintain its approach to environmental intervenors. We hope to avoid changes that would force environmental intervenors to be combined or limit the scope of their participation. Environmental intervenors are increasingly important to the OEB's mandate of protecting the interests of ratepayers, especially their financial interests. Our energy systems are undergoing a massive transformation with decarbonization. Environmental expertise and input can help avoid expensive pitfalls and find opportunities to reduce costs to customers during the transition.

We have focused these comments on (a) the potential changes outlined in the discussion paper and (b) some additional potential changes we believe could improve intervenor processes.

Clarifying Application Expectations

We recommend that the OEB direct applicants to include the following information in their pre-filed evidence:

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(a) Relevant materials they expect intervenors will request based on interrogatories in previous cases filed by the utility; and

(b) Pre-existing internal business cases relating to the approvals sought.

This can save time and money in three ways:

(a) Intervenors can avoid interrogatories asking for those materials;

(b) Intervenors will have more information, which may negate the need for other interrogatories; and

(c) Questions on these materials can be made in interrogatories, instead of waiting for a technical conference or an oral hearing.

On a number of occasions, we have faced applications that include scant detail on topics that will obviously be contentious. This results in a significant waste of time and money. Interrogatories are used simply to understand the lay of the land and obtain key calculations that could have been filed initially. The technical conference is then lengthened by questions that could have been asked by interrogatories had the application been more detailed. The debate about those answers then gets pushed into the hearing, if an oral hearing is held. This is inefficient and ineffective.

We suggest the filing of pre-existing business cases because (a) it requires minimum effort for utilities and (b) it can avoid the need for interrogatories. The discussion paper suggests that the OEB should strive to reduce the quantity of evidence contained in applications. We agree irrelevant material should be excluded, but we believe that increasing the quantity of relevant material in the pre-filed evidence could speed up the *overall* proceeding. In addition, now that processes are electronic, more material does not mean more paper, and large volumes of material can be effectively searched.

The OEB has recognised the potential time saved by anticipating interrogatories in the pre-filed evidence. For example, the 2011 filing guidelines for OPG payments amounts states as follows:

> In determining what evidence to file, OPG should consider what information the Board and the intervenors are likely to request, and provide that information in the filed evidence rather than waiting for the request to be made at the hearing. This will ensure a better use of hearing time, and a more focused and informed cross examination.

This reasoning could be extended to other kinds of applications and given greater emphasis.

Finally, these suggested steps can improve outcomes. Filing more materials sooner in the process will assist intervenors and Board Staff in examining utility filings more effectively.

Intervenor Status: Substantial Interest

We believe changes with respect to intervenor eligibility are not needed. We are not aware of any problems with the existing processes that require fixing. The changes mooted in the

discussion paper would, if anything, add complication, uncertainty and cost. We have focused on two of the potential changes on page 17 of the discussion paper. These are particularly concerning as they could result the OEB losing important perspectives, expertise, and independent input.

Avoid requiring intervenors to combine

We are particularly concerned about the proposal to require overlapping "limited scope" intervenors to conduct a "combined intervention," with cost awards set commensurately. We hope this is not intended to refer to environmental intervenors. But if it is intended to capture environmental intervenors, it would disproportionately undermine those perspectives, to the detriment of the OEB and ratepayers.

Environmental intervenors are increasingly important to the OEB's mandate of protecting the interests of ratepayers, especially their financial interests. Our energy systems are undergoing a massive transformation with decarbonization. Environmental expertise and input can help avoid expensive pitfalls and find opportunities to reduce costs to customers during the transition.

Environmental intervenors already collaborate as much as possible. Environmental Defence will continue to do so. We collaborate with all intervenors. In many cases we are very happy to have another party deal with an issue so that we do not have to. But that is also often not the case.

Requiring combined interventions will result in a significant loss of important perspectives and expertise to the board:

- **Lost perspectives:** Some environmental intervenors have very different viewpoints about issues relevant to OEB matters, such as the most cost-effective ways to achieve net-zero energy transitions. Requiring combined interventions will mean the loss of important viewpoints.

- **Lost expertise:** With all intervenors, the expertise and competence of their consultants and representatives is important, and varies considerably. If the OEB will only allow one environmental intervenor, it will lose access to expertise.

- **Lost independence:** Environmental Defence is a fiercely independent organization that does not receive funding from fossil fuel companies. That is not the case with all environmental intervenors. Requiring involuntary combined interventions could result in the loss of 100% independent environmental voices.

In the past the OEB has considered limiting environmental intervenors to one and has always decided against it. Now is not the time to change course.

Finally, we note that there are far more intervenors representing the traditional cost-reduction ratepayer view than there are intervenors representing the environmental consumer view. Traditional ratepayer intervenors have varying constituents in many cases but also a great deal of overlap in interests. Divergent interests tend to be greatest with respect to cost allocation and the least when it comes to reducing revenue requirements. However, traditional ratepayer

intervenors nevertheless have differing views and different representatives that bring different value on different issues. The same is true for environmental intervenors. Environmental intervenors should not be singled out as having less to contribute and therefore required to combine any more than traditional ratepayer groups should.

Avoid pre-defined cost limits for limited-scope intervenors

We recommend that the OEB not adopt pre-defined cost limits for limited-scope intervenors. Although we understand the initial appeal of this idea, there are unresolvable challenges with it.

First, it is not possible to predict the cost of an intervention up-front in many cases. The time required varies based on, for example, (a) interrogatory and technical conference answers, which may resolve issues or raise new ones, (b) inadequate responses to questions, which may necessitate motions or additional technical conference questions, or (c) unanticipated issues raised by other parties on which the intervenor takes a different or opposing view.

Second, it would be a challenge to define which intervenors are "limited-scope" intervenors in many cases. This could be contentious in some cases and therefore require an opportunity to be heard through submissions, specific criteria, and OEB decisions.

Third, the steps to define which intervenors are "limited-scope", set budgets, adjust budgets, and compare costs to budgets will all take time. This would add steps to the regulatory process, not shorten it. It would also add burden and cost for intervenors – time that would be better spent focusing on the issues themselves.

Cost Awards

We agree with the comments of other intervenors that the current quantum of cost awards are reasonable and that attempts to limit them prior to the post-hearing disallowance process are not in the interest of ratepayers. Attempts to pre-emptively constrain intervenor participation could backfire, resulting in cost savings that are trivial in comparison to the potential negative outcomes for ratepayers through diminished scrutiny of the approximately $25 billion in costs at issue.

Other intervenors have made detailed comments on the downside of the potential changes to cost award processes outlined in the discussion paper. We need not repeat those and add only the following comments:

- **Collaboration:** See page 3 above under the heading "avoid requiring combined interventions" for comments about the pitfalls of attempting to require involuntary collaboration. Also, from a cost perspective, collaboration can increase costs. Although collaboration can decrease costs if a party is able to fully and completely hand off an issue to another party, that is often not possible for a variety of reasons. Co-operation of multiple parties on the same issue can require additional meetings and correspondence to ensure alignment, which can be time consuming.

- **Fee schedule:** The fee schedule has declined considerably in real dollars over the years. However, keeping the fees static such that they decline in real dollars is a far better way to reduce costs in comparison to other potential changes to the existing process that would further restrict scope early on, require involuntary collaboration, or restrict the participation or cost eligibility of environmental intervenors. Environmental Defence's primary interest is in being able to explore and advocate for ways to reduce bills and carbon emissions through good planning, energy efficiency, and so on. We can do that with the existing fee schedule. We cannot do that if we are forced out of proceedings, forced to hand over responsibility to address important issues to others through involuntary combined interventions, or unable to obtain the information we need to advocate for applicants to do better.

- **Post-hearing cost assessment:** We recommend that the OEB require utilities to disclose their regulatory costs as part of the post-hearing cost assessment process. We understand that the OEB is in a difficult position assessing cost claims. Additional cost information from utilities will provide one additional yardstick.

- **Allow a group municipal intervenor:** OEB proceedings usually lack municipal voices. They are increasingly important, including because of municipal energy plans. The current OEB rules disallow costs for "a municipality in Ontario, individually or in a group." We recommend that "in a group" be struck out, which would provide a membership organization representing municipalities the opportunity to participate. This would benefit ratepayers by adding a very important perspective which is often missing.

Use of Expert Witnesses

The OEB has in recent years required budgets for the creation of expert evidence. We believe this is appropriate, but that the budget requirement should focus on the creation of evidence, not the subsequent steps. There is a need for flexibility in expert costs beyond the creation of the evidence itself, such as answering interrogatories and participating in a technical conference or a hearing. These costs can be largely out of the control of the expert and intervenor. They depend on factors such as:

- The number and complexity of interrogatories;

- The number of technical conference questions;

- The scheduling of the technical conference (being later in the order can in some cases necessitate the expert sitting in for earlier portions to hear earlier evidence);

- Whether a presentation day is scheduled; and

- The scheduling of the hearing (being later in the order can in some cases necessitate the expert sitting in for earlier portions to hear earlier evidence).

It is already challenging for environmental intervenors to find experts who are willing to work with the uncertainty of not getting paid. Environmental intervenors generally have no resources

to cover costs in the event of a cost disallowance. Requiring budgets even only for the initial creation of evidence raises challenges. For example, the budgets will be required before interrogatory responses are received, which may impact the work required (e.g. if questions regarding key inputs are or are not answered). But requiring budgets for all steps in the proceeding is considerably more burdensome and potentially unfair to those experts who have little or no control over the subsequent steps.

Active Adjudication

We recommend that the OEB maintain its existing approach to active adjudication at the pre-hearing stages (e.g. issues hearings) but increase active adjudication during oral hearings.

Maintain pre-hearing processes

Current pre-hearing processes, such as issues lists and issues days, are effective. Attempts to further limit scope during pre-hearing processes could backfire by increasing the number of contentious motions. There is only so much that can be done to limit scope in early stages. Scope questions can bleed into substantive questions about the merits of the applications. Attempting to define scope too crisply can therefore require getting into complicated factual disputes. This raises two risks:

- **Wrong decisions:** If scope is narrowed too early through brief written submissions and without a full examination of the facts, this can result in incorrect decisions.

- **Time wasted:** Attempting to narrow scope can take time and extend the regulatory process by resulting in contentious early motions.

The same is true for OEB rulings regarding the appropriateness of interrogatories or technical conference questions. Being restrictive early on can backfire, leading to more contentious motions and the potential to miss important information.

A relevant comparison can be drawn from civil litigation. My practice includes class actions and litigation in all levels of courts and in other administrative tribunals. Courts are generally very reluctant to make firm decisions limiting scope prior to the final hearing. For instance, courts will only strike down a claim if it is "plain and obvious" that it has "no reasonable prospect of success."[1] The "plain and obvious" and "no reasonable prospect" modifiers are important as courts do not want to weigh into contentious complex issues before all the details are on the table. In the same way, the OEB should have a light hand in the early stages.

The OEB already makes high-level judgements about scope and relevance early on in proceedings. This works. But moving beyond this to a greater level of specificity or attempting to narrow the issues even further is not in the interests of ratepayers.

More active oral hearing management

[1] See e.g. *J.K. v. Ontario*, 2017 ONCA 902 (CanLII), https://canlii.ca/t/hnx17.

Oral hearings could be managed more actively. There are two primary issues that we see could be improved in OEB hearings.

First, the OEB could increasingly disallow meandering intervenor questions which are not intended to elicit relevant evidence. A practice has developed in OEB proceedings wherein some participants ask "questions" that appear to be more in the nature of speeches to make arguments. It may be that the purpose is to make a point to the Commissioners rather than elicit evidence. These questions would be quickly disallowed by judges in a court setting. The OEB could more actively restrict these kinds of questions.

Second, the OEB could increasingly direct witnesses to provide actual answers to questions posed to them. A practice has developed in OEB proceedings for some witnesses to avoid answering clear yes/no questions and instead providing very long answers that re-iterate the pre-filed evidence. This can take a long time. It may be that witnesses do not wish to provide an answer and instead focus on points they want to make to the Commissioners. We sometimes see witnesses repeating the same list of facts over and over again, which are already contained in the pre-filed evidence. The OEB could remedy this with more active adjudication.

Oversight of Scope of Proceedings

Question 13 asks: Are there other tools that the OEB could employ to ensure that the scope of a hearing and materiality of issues is clearer earlier in the proceeding? Please see above under the heading "maintain pre-hearing processes" for the reasons why the existing practices are effective and why moving beyond current practices to restrict scope could backfire, to the detriment of ratepayers.

Generic Proceedings

We recommend a generic hearing on the future of gas in light of net-zero targets in 2050 and ongoing energy transitions. Similar generic proceedings have been struck by multiple regulators across the United States. An article from 2020 in Utility Dive described the issue as follows:

> Throughout this year, a subtle but meaningful shift has occurred within utility regulatory agencies across the country. Multiple states have opened official proceedings investigating the future of gas distribution in their state.
>
> This could be the beginning of a significant trend, as key energy decision-makers are realizing the need to confront a new issue: how to plan for a major infrastructure system that may become obsolete.[2]

We have not conducted an analysis to compile a full list of jurisdictions where future of gas proceedings are taking place. But examples include Massachusetts, Oregon, New York, and California.[3]

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[2] Utility Dive, *Utility regulators wake up to the long-term risks of gas*, December 9, 2020 (link).
[3] *Ibid*.; See also: https://thefutureofgas.com/overview and https://www.climatesolutions.org/article/2021-12/oregons-future-gas-process-what-it-and-why-does-it-matter.

Issues about the future of gas in a decarbonized world have come up in the gas integrated resource planning proceeding, gas multi-year demand-side management proceeding, and in multiple gas leave to construct applications. This issue comes up repeatedly because gas infrastructure being built today will only be fully depreciated in the 2070s. Decarbonization pathways could greatly impact the economics of these projects and analysis on this is not being done. It is inefficient and ineffective to address these issues tangentially in multiple separate proceedings.

A generic hearing on this topic is also important to protect ratepayers. Gas pipelines may or may not have a role in a net-zero future by 2050. Ratepayers need to be protected no matter what the outcome is. This requires proactive early planning now. To be clear, we are not suggesting that the OEB decide what the future will be. That is not possible. We are suggesting a generic hearing to look at the possible outcomes and how those possibilities should impact planning and decisions made with respect to energy today.

Conclusion

In conclusion, we believe the current OEB practices are effective. It is not in the interest of ratepayers to require intervenors to combine involuntarily or go beyond current practices to further restrict the scope of proceedings. However, we believe improvements could be made by:

- Directing applicants to include documents in their pre-filed material that they expect intervenors will request based on interrogatories in previous cases filed by the utility;
- Removing the restriction on cost-eligibility for a group of municipalities;
- Requiring budget estimates for the creation of expert evidence, but not for the subsequent steps over which the expert has little or no control;
- Increasing active adjudication during oral hearings to (a) disallow lengthy “questions” not aimed at eliciting relevant answers and (b) requiring witnesses to answer the actual questions posed to them; and
- Holding a generic hearing into the future of gas in a decarbonized world to consider how current planning and decisions should be informed by potential decarbonization pathways.

We thank the OEB for the opportunity to provide these comments.

Yours truly,

Kent Elson